Lost in translation

Firms employing foreign nationals need to ensure they are up to date with legislation, say **Jamie Cameron** and **Ian Taylor.**

The number of foreign nationals employed in the UK has been rising steadily over the past few years. Recent statistics show that between 2000 and 2011, the percentage of migrants in employment in the UK workforce has almost doubled from 8% to 15% (the Migration Observatory, August 2012).

This shift is partly due to the increasing free movement of workers within the EU. There is also a growing migration of workers from expanding economies such as China, Brazil and India. Businesses are embracing this trend by employing migrants who offer particular skills and experience not otherwise available in the UK market.

Having satisfied themselves that foreign nationals have the right to work legally in the UK, many employers assume they can then treat the migrant employee as they would any other worker. While by and large this is true, there are certain triggers in the employment lifecycle where the worker's status as a foreign national will affect the employer's practices.

Workers from outside the EEA and Switzerland

In terms of determining immigration status and the right to work, migrants come from either inside or outside the European Economic Area (EEA) and Switzerland. If they come from within the EEA and Switzerland, they are likely to have the unrestricted right to work in the UK. Migrants from outside the EEA and Switzerland will require immigration permission to work in the UK.

If you intend to employ a non-EEA foreign national, be aware that the business may need to register as a sponsor with the UK Border Agency (UKBA).

Recruitment

Many employers are aware of the importance of following best practice in carrying out any recruitment process regardless of whether or not they recruit foreign nationals. It helps secure the best candidate for the job and produces objective – and non-discriminatory – reasons for why an applicant has been unsuccessful.

Foreign nationals who have been turned down for a UK role would usually be entitled to bring a discrimination claim in the same way as an unsuccessful UK citizen. Employers should therefore bear this in mind and follow the same best practice recruitment procedures when interviewing foreign nationals as with UK candidates.

Recruitment: best practice

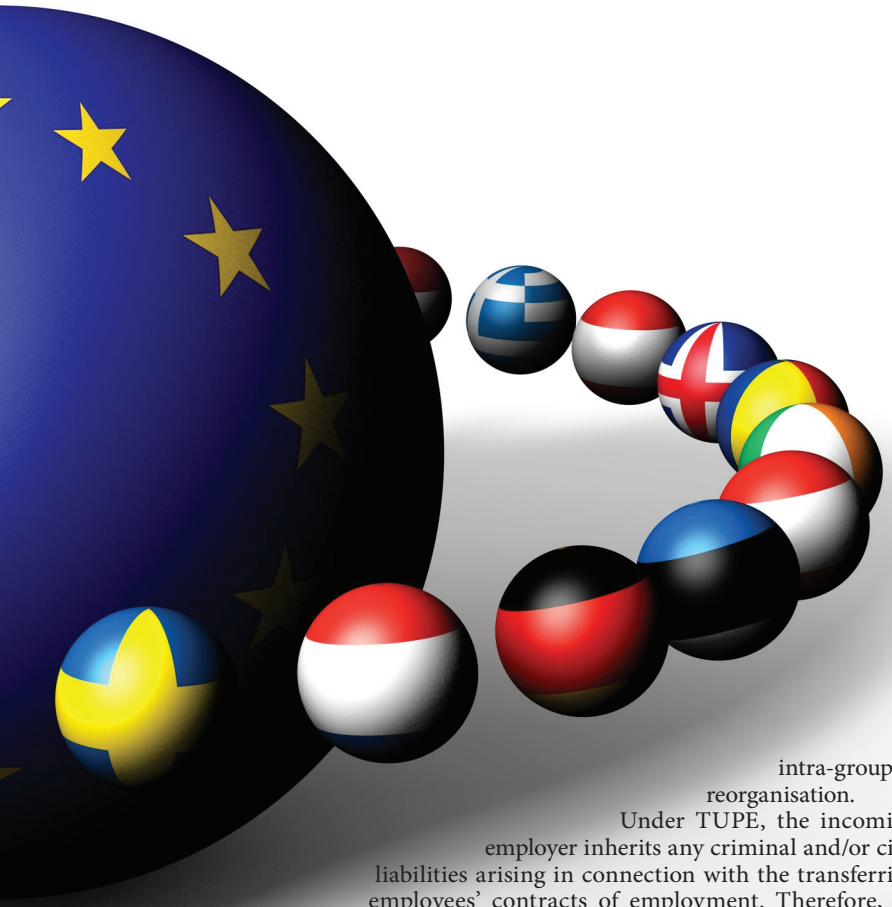
- When recruiting, a clear job description setting out the skills and experience you are looking for is critical.
- Interviewers should use a standard set of questions, which are asked of all candidates, and should document the answers given. This makes it easier to provide objective reasons why a candidate has been unsuccessful.
- Employers may be able to make a recruitment decision on the basis of an applicant's race in limited circumstances. Typically this would occur where it is an occupational requirement of the specific role that the applicant is of a particular race or speaks a certain language. Situations where such a decision can be lawfully made are limited. The Equality and Human Rights Commission (in its Employment Statutory Code of Practice) provides an example of a local charity setting up a healthcare project to encourage women from a Somali background to use more health services. In such a situation, the charity may seek to limit applications to Somali women. This may be permissible on the basis that it wishes to employ an individual who can visit women in their homes and have good knowledge of the culture and language of the charity's clients.
- Once an appropriate candidate has been selected, employers must check the individual has the immigration permission necessary to enable them to carry out the role in the UK. These document checks should be carried out for all prospective employees regardless of nationality – UK or otherwise. An employer that fails to do this and is found to be illegally employing a foreign national risks having to pay a civil penalty of up to £10,000 per illegal worker and criminal sanctions.

Offering roles to foreign nationals: practical points

- Offer letters: offers of employment should be conditional on the employee being granted and maintaining the necessary permission to carry out the role for which they will be employed in the UK.
- Contracts of employment: employment should be conditional on the employee maintaining immigration permission and terminable summarily if the employee cannot do so (see below for more detail). Employees should also be required to report changes in their personal details, including immigration status.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

Employers that are taking on non-EEA migrants following a TUPE transfer should be aware that this raises specific issues – even where the transfer arises from an



intra-group reorganisation.

Under TUPE, the incoming employer inherits any criminal and/or civil liabilities arising in connection with the transferring employees' contracts of employment. Therefore, an incoming employer taking over non-EEA employees who do not have the right to work in the UK could face criminal liabilities and civil penalties as a result. Employers should, therefore, ensure that the pre-transfer due diligence includes a check on immigration status to make sure they do not inherit illegal workers inadvertently.

Employers should also identify whether they will be inheriting non-EEA migrants who are sponsored by their current employer. If so, and if the business does not hold a sponsorship licence, employers must apply for registration with the UKBA as a sponsor within 28 days of a transfer taking place.

An employer failing to register with the UKBA risks being found to be illegally employing foreign nationals – this can lead to civil and criminal penalties and the employees may be required to leave the UK. In addition, the business could damage its chances of being granted a sponsorship licence in the future should it wish to apply for one.

Termination of employment

If an employer wishes to dismiss a foreign national for reason of conduct, performance or redundancy, it should do so in the same way as it would a UK national. This is because foreign nationals working in the UK will usually have the same protection against unfair dismissal, discrimination and breach of contract as UK employees.

If an employee's immigration permission is due to expire and cannot be extended, the business will need to terminate the migrant's employment. Continuing to employ a foreign national in the UK without permission is a civil offence and could also result in the employer facing criminal liability.

To carry out the dismissal fairly there are two potential reasons that can be used. The first reason is illegality – once visa permission has expired, a business cannot lawfully continue to employ a non-EEA national. If an employer dismisses for this reason, the dismissal can usually be effected without notice and can offer the quickest and cheapest option.

However, there are risks to this. In particular, existing case law (*Kelly v the University of Southampton, UKEAT/0295/07*) means that illegality will be a fair reason only if the employer can actually prove that the non-EEA national did not have permission to work in the UK. It is not sufficient for an employer simply to believe that the employee does not have permission, even if it has carried out reasonable investigations.

In *Kelly*, the employer had been advised by the UKBA that the employee did not have the necessary immigration permission, but was not allowed to use this as justification for the decision to dismiss when that information subsequently turned out to be incorrect.

This means that the safer option for dismissing an employee who is going to lose the right to work here is for "some other substantial reason"; namely, the employer's reasonable belief that the employee will not have permission to lawfully work in the UK.

This approach would protect employers that took reasonable steps to assess whether or not the non-EEA national had permission to work in the UK – even if they relied on advice that subsequently turned out to be incorrect. Dismissal for some other substantial reason would typically be on notice and therefore employers should ensure that they allow enough time to deal with these issues before any immigration permission expires.

In addition to having a fair reason, employers should follow a fair process. This is likely to involve meeting with the employee, probably on a number of occasions, considering the relevant visa documentation and looking at ways of avoiding dismissal. The business should consider what steps it can take to assist the employee to obtain further immigration clearance.

Foreign employees have the right to be accompanied at such meetings in the same way as UK employees. Try to ensure that any process is started in advance of the expiry of the visa and the discussions are open and frequent about the consequences of losing immigration clearance.

Following a fair process will help employers to protect their position from the additional risk of former employees claiming their dismissal was because of their race.

Conclusion

Knowing how and when it is appropriate to treat foreign national employees differently from your UK national employees is not always easy. For the most part, employers should treat them in the same way. But remember that recruitment, TUPE transfers and termination of employment are three key areas where the visas that foreign national employees hold may give rise to particular issues that can affect business practice.

THE AUTHORS

■ Jamie Cameron is a senior associate and Ian Taylor a solicitor at Burges Salmon LLP. Email: jamie.cameron@burges-salmon.com and ian.taylor@burges-salmon.com

More on employing foreign workers on Personnel Today

www.personneltoday.com/xperthr119

www.personneltoday.com/xperthr120

And from XpertHR (subscription only)

www.xperthr.co.uk/article/55209/.aspx